WHAT IS AN ALLONGE?—In *Clark* v. *Thompson et al.*, 69 So. 925, the joint note of a husband and wife was secured by a mortgage executed on the wife's realty. The money for which the note was given was lent to the husband alone, and this fact made the wife liable as surety only. The mortgage was pinned to the note, and both instruments in that condition were delivered to the payee. The latter sold the note to the respondent, but the indorsement was made upon the mortgage, instead of upon the back of the note where there was ample space for an indorsement. The wife filed a bill to have the mortgage cancelled. The lower court dismissed the bill on the theory that the respondent was a holder in due course and therefore free from any equities that might have existed against the original payee. On appeal, the decree was reversed, the Supreme Court of Alabama holding that the writing was not on the instrument itself, nor upon a paper attached thereto within the meaning of the statute, and that the transfer was therefore a mere assignment which subjected the holder to all existing equities.

The case raises a question as to the construction of the provision of the NEGOTIABLE INSTRUMENTS LAW requiring that "The indorsement must be written on the instrument itself or upon a paper attached thereto." As the customary indorsement is upon the back of the instrument itself, cases like *Clark* v. *Thompson* are few; but the problem presented is an important one. As the provision above is but a statutory affirmation of the rule founded by the law merchant, a possible solution must be found in the body of that law. The literal meaning of the word itself,—"in" and "dorsum", "on the back"—suffices to show the early requirements of an indorsement according to the custom of the merchants. The indorsement must have been on the back of the instrument itself. An exception to this rule was early established in the case of *Yarborough* v. *Bank of England,* 16 East 6, where a writing on the face was held to constitute an indorsement, if intended as such; and that exception has been generally accepted. *Shain* v. *Sullivan,* 106 Cal. 208; *Haines* v. *Dubois,* 30 N. J. L. 259. A second, and more important exception was also a matter of early recognition. An indorsement upon a separate paper attached to the instrument would be sufficient under certain circumstances. This paper was called an "allonge," and though its use as a general proposition is everywhere conceded, the precise circumstances under which it may be warranted, and the requirements as to its nature—whether it must be a blank paper or not—are subject to uncertainty and dispute. In the absence of any definite source of understanding it would seem that the meaning of the word itself might afford some reliable information. "Allonge" is the French for "elongation." The extension or continuation thus suggested would logically lead to the inference of necessity. An extension of any sort is most generally associated with necessity; it is also considered as forming an integral part of the thing extended,—and so it would seem to have been originally in the matter of an allonge. As there is no legal limit to the number of indorsements, the back of the instrument might become filled with writing. Upon such contingency the function of the allonge enters; the paper is attached to the instrument, becomes part of it, and added space is thereby created for further indorsements. The earlier text writers in their discussion

of this subject uniformly treat necessity as the prerequisite to an indorsement on this distinct though attached paper. CHITTY, BILLS, § 235-6 says, "If there be more indorsements than can be distinctly written on the back of the bill itself, a paper may be annexed called in France an 'allonge' on which the latter indorsements may be written, and which is considered part of the bill itself." In STORY, BILLS, § 204, it is said that an indorsement on "another paper, annexed thereto, which is sometimes necessary when there are successive indorsements to be made," is good; and the same author in his work on PROMISSORY NOTES § 151 quotes the above passage from CHITTY. In § 115 of BYLES, BILLS the proposition is stated as follows: "If there be not room to write them all distinctly on the back of the bill, the supernumerary indorsements may be written on a slip of paper annexed to the bill called in French an 'allonge.'" To the same effect is § 264 of TIEDEMAN, COMMERCIAL PAPER: "If, however, in consequence of frequent and numerous negotiations of the instrument, the successive indorsements have completely covered the back, an extra piece of paper may be tacked or pasted on the instrument and all further indorsements may be written on this attached paper." BENJAMIN'S CHALMER'S DIGEST OF THE LAW OF BILLS OF EXCHANGE, 122 is equally specific as to this element of necessity: "Where there is no room on a bill for further indorsements, a slip of paper called an 'allonge' may be attached thereto;" and DANIEL in § 690 of his work on NEGOTIABLE INSTRUMENTS refers to the matter in the following words: "It sometimes happens, that by rapid circulation from hand to hand, the back of the paper is completely covered by indorsements; and in such cases the holder may tack or paste on a piece of paper sufficient to bear his own and subsequent indorsements, and thereon the indorsements may be made."

None of the above writers seem to intimate that an indorsement may be made on an attached paper under circumstances other than those of necessity; and the implication from the language used would seem to make this necessity the pre-requisite of an indorsement so made. In some of the later works, however, an entirely new proposition appears, to the effect that necessity is not the only ground for allowing an indorsement in the manner described; but mere convenience of the parties is sufficient. Thus in EATON & GILBERT, COMMERCIAL PAPER, it is said, "It is not essential to a transfer of a note by this mode that there should have been a physical impossibility of writing the indorsement or transfer on the note itself, but it may be on another paper attached to the note whenever necessity or the convenience of the parties requires it." The treatment by HUFFCUT in his LAW OF NEGOTIABLE INSTRUMENTS is to the same effect: "The rule as commonly stated is that where there is not room on the bill, the indorsement may be on an allonge. But it is not necessary that there should be a physical impossibility of writing the indorsement on the instrument itself; it may be on an allonge whenever the necessity or convenience of the parties require it." An examination of the cases cited in support of this proposition seems to find them as emanating from one jurisdiction only, namely, that of Wisconsin. The basic case is *Crosby* v. *Roub*, 16 Wis. 616. There, a note secured by mortgage

was delivered to a railway corporation. The latter issued its negotiable bond for an amount equal to that of the note. Both the note and mortgage were attached to the bond, in the body of which latter was a recital that the corporation thereby transferred the note and mortgage as security, that both would be transferable in connection with the bond and not otherwise. This was held a sufficient indorsement to pass title. The decision was followed in *Andrews* v. *Hart,* 17 Wis. 306; and was expressly reaffirmed in *Bange* v. *Flint,* 25 Wis. 544, in the face of contrary decisions of other jurisdictions that had assailed and repudiated the doctrine of *Crosby* v. *Roub.* The reasoning in this latter case supporting the novel proposition is based upon the fact that the usage of the mercantile law is "founded upon convenience," and as an exception had already been early introduced permitting an indorsement to be made on the face of the instrument, for reasons probably of mere convenience, so it would seem that for the same reasons another exception might be made in allowing the indorsement to be made on a paper attached.

This doctrine, however, as championed by the Wisconsin courts is squarely opposed by that of at least a half dozen other jurisdictions where the matter has received attention. In *Bishop* v. *Chase,* 156 Mo. 158, the indorsement was on a slip of paper pinned to the note. It was held that in the absence of any necessity for indorsing on a separate, though attached, paper, the writing amounts to an assignment only. In *Doll* v. *Hollenbeck,* 19 Neb. 639, the note and mortgage were transferred by indorsement on the mortgage. The two papers were not fastened together, so by no possibility could the writing have amounted to an indorsement in the commercial sense, but the court distinctly expressed itself to the effect that even had they been, the writing would still have been a mere assignment, as there was ample room for indorsement on the back of the note itself. The same situation and result is found in *French* v. *Turner,* 15 Ind. 59; *Hays* v. *Plummer,* 126 Cal. 107; *Trader's Deposit Bank* v. *Chiles,* 14 Ky. L. Rep. 617. In *Fountain* v. *Bookstaver,* 141 Ill. 461, necessity was held to be the test, and the indorsement on the slip attached found good because there was no room on the back of the instrument itself. In *Crutchfield* v. *Easton,* 13 Ala. 337, necessity is likewise made the test. In the cases of *Franklin* v. *Twogood,* 18 Iowa 515; *Haskell* v. *Brown,* 65 Ill. 29; and *Osgood* v. *Artt,* 17 Fed. 575, the facts are substantially the same as in *Crosby* v. *Roub,* supra. The courts, though voicing dicta in favor of the necessity doctrine, chose to base their decision—establishing the same result—on another ground, namely, that the transfer in writing was made not on a separate *paper merely,* attached to the instrument, but in a separate legal *instrument,*—an instrument which was made for a distinct purpose, which had a distinct existence, and which could not so lose its identity as to become incorporated into the note. In other words the bond, though attached to the note, is the principal instrument, not the incident as would be a blank piece of paper; it could not therefore become a part of the note in the sense that could the blank paper which had no identity of its own as a separate *instrument.* These last three cases, therefore, stand, as well, for the proposition that the paper used as an allonge must be of a

nature that can readily merge its identity into that of the instrument to which it is attached. It must not be in itself a separate legal instrument. The reasoning in support of the doctrine of necessity would seem to proceed somewhat as follows: An indorsement is an institution of the law merchant, and carries with it consequences that are peculiar to itself; a writing to be subjected to those consequences must be made in the manner prescribed by the custom of the merchants; such custom has required the indorsement to be made either on the instrument, or, when the back of the latter is already filled then on a paper attached for the purpose; that if the writing appears on an attached paper in the absence of the element of necessity, it must be presumed that the intention was to avoid the consequences of the technical indorsement and make the writing a mere assignment.

The cases, then, on the matter of an allonge would seem to show three lines of decision: first, one which requires necessity to be present before allowing the allonge and indorsement thereon, and which places no stress on the nature of the paper used; second, one which permits mere convenience to warrant the allonge, and which likewise places no stress upon the nature of the paper; third, one which places all stress upon the nature of the paper attached and requires it to be of a character other than that of a separate instrument made for an independent purpose. The instant case is of the first class; and it places Alabama among those jurisdictions that have expressly repudiated the doctrine initiated by *Crosby* v. *Roub.* T. H. W.

RIGHTS OF THE PARTIES TO A CONTRACT DISCHARGED BY IMPOSSIBILITY OF PERFORMANCE.—In consideration of the defendant moving plaintiff's barn and paying plaintiff $100 the plaintiff agreed to allow the defendant to use his land. Before defendant moved the plaintiff's barn it was burned through no fault of either party. Plaintiff now sues to recover the loss which he has suffered by reason of the failure of defendant to move the barn. *Held*: Plaintiff can recover, and the measure of damages is what it would have cost defendant to move the barn. *Jones-Gray Construction Co.* v. *Stevens,* (Ky. 1916), 181 S. W. 659.

Where contracts, after being partly performed, are discharged because of impossibility of performance, difficult questions arise as to the rights of the parties. If the contract is divisible and severable, e. g., if the price paid for the performance is payable in installments as a certain portion of the work is completed, and these installments are proportioned to the value of the work done, the plaintiff can recover for the installments fully earned. *Richardson* v. *Shaw,* 1 Mo. App. 234; *Siegel-Cooper Co.* v. *Eaton Co.,* 165 Ill. 550, 46 N. E. 449. If the contract is not severable and the consideration is entire for the complete performance of the contract, the court cannot make over the contract by apportioning the consideration, and the recovery, if any, must be quasi-contractual. The question has frequently arisen where plaintiff agreed to furnish labor and materials in the improvement of an existing building and the building is accidentally destroyed after part of the work is done. The weight of American authority in such cases is to the effect